STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 24, 2015
v	No. 319727 Oakland Circuit Court
DETRICK DORAL LANCE, Defendant-Appellant.	LC No. 2013-244985-FH

Before: BOONSTRA, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(*iii*), felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony (second offense), MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent terms of 19 months to 25 years' imprisonment for the possession with intent to deliver cocaine conviction, 19 months to 15 years' imprisonment for the possession with intent to deliver marijuana conviction, and 19 months to 20 years' imprisonment for the felon-in-possession conviction, to be served consecutive to three concurrent five-year terms of imprisonment for the felony-firearm convictions. Defendant appeals as of right, and we affirm.

In the fall of 2006, a confidential informant participated in two controlled purchases of drugs from a home located at 160 North Merrimac in Pontiac. After the confidential informant would make a call to arrange to purchase drugs, defendant would exit the home, get into a vehicle, drive to the meet location, and make a hand-to-hand transaction. The informant engaged in two controlled purchases of narcotics with defendant. After the second transaction, the police obtained a search warrant, which they executed within 48 hours of the last controlled buy,

Defendant and a female, Tiffany Robinson, were both present in the home when the search warrant was executed on October 20, 2006. On the living room couch the police found a pair of men's pants, size 38, which contained approximately 1.5 grams of cocaine in the pocket. In the kitchen, a digital scale and glass jar were found with a powder residue. Baggies of cocaine and marijuana and a cutting agent, Mannitol, were found in a kitchen cabinet, and documentation addressed to defendant was also found in the cabinet, which included a pay stub and dental receipt. Defendant's birth certificate and a copy of his social security card were found in a

kitchen drawer. A rifle was observed in plain view in the small room or vestibule next to the kitchen. Defendant had $725 in cash on his person. Deputy Daniel Main opined that the packaging and amount of marijuana and cocaine was indicative of drug trafficking, not personal use.

Brandy James, the mother of two of defendant's children, testified that defendant resided with her in October 2006. At that time, defendant worked and attended college for which he received financial aid. Defendant did not have a vehicle, and James drove defendant to work and school. James admitted, however, that defendant was sometimes allowed to drive her car. According to James, defendant wore a size 36 pants, and the pants seized by the police did not belong to defendant. James stated that defendant visited Robinson to play cards, but there was no romantic relationship between the two.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence that he possessed the drugs or the firearm found at the North Merrimac residence. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010). The evidence is reviewed in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013). All conflicts in the evidence are resolved in favor of the prosecution, and circumstantial evidence and reasonable inferences arising from that evidence may constitute proof of the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). Thus, this Court's review is deferential because the trier of fact, not the appellate court, properly determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *Malone*, 287 Mich App at 654. An appellate court will not interfere with the jury's assessment of the weight of evidence or the credibility of the witnesses. *Dunigan*, 299 Mich App at 582; *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012).

The elements of possession with intent to deliver less than 50 grams of cocaine are: (1) the recovery of cocaine; (2) the cocaine was in a mixture with a weight of less than 50 grams; (3) the defendant lacked authorization to possess the cocaine; and (4) the defendant knowingly possessed the cocaine with the intent to deliver. *People v Gonzalez*, 256 Mich App 212, 225-226; 663 NW2d 499 (2003). To establish the offense of possession with intent to deliver less than five kilograms of marijuana, the prosecutor had to prove: (1) defendant knowingly possessed a controlled substance; (2) defendant intended to deliver the controlled substance to another; (3) defendant was aware that the substance was marijuana; and (4) the marijuana was in a mixture that weighed less than five kilograms. *People v Williams*, 268 Mich App 416, 419-420; 707 NW2d 624 (2005). To establish the felony-firearm offense, the prosecutor had to prove that defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011). A person convicted of a specified felony cannot directly or constructively possess a firearm. MCL 750.224f; *People v Minch*, 493 Mich 87, 91; 825 NW2d 560 (2012).

Defendant only contends that the possession element of the offenses was not established. In *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), the Court articulated circumstances to determine whether there is possession of a controlled substance:

> A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance. [Citations omitted.]

In *People v Bylsma*, 493 Mich 17, 31-32; 825 NW2d 543 (2012), the Court expanded on these principles, holding:

> Furthermore, a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Rather, the essential inquiry into possession is whether there is a sufficient nexus between the defendant and the contraband including whether the defendant exercised a dominion and control over the substance. [Quotation marks and footnotes omitted.]

Actual possession occurs when an individual exercises direct physical control over a thing at a given time. *People v Flick*, 487 Mich 1, 15; 790 NW2d 295 (2010). Even if an individual does not have actual possession, a person constructively possesses a thing if he knowingly has the power and intention at a given time to exercise dominion or control over it through direct acts or through the acts of another. *Id*. at 14-15. "Constructive possession of an illegal substance requires proof that the defendant knew of its character." *People v McGhee*, 268 Mich App 600, 610; 709 NW2d 595 (2005). The possession determination must be examined in light of the totality of the circumstances. *Wolfe*, 440 Mich at 521.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish defendant's constructive possession of the cocaine and marijuana found at the North Merrimac residence. On two occasions, the police observed defendant leave the North Merrimac residence and participate in hand-to-hand transactions with a confidential informant who had arranged to purchase cocaine. Defendant's participation in these drug sales after leaving the Merrimac home, and returning to the home after the transactions were completed, was evidence of defendant's dominion and control over the illegal substances found at the home. Furthermore, defendant was the only male person at the home when the search warrant was executed, and the police discovered a pair of men's size 38 jeans on a couch with approximately 1.5 grams of cocaine in the pocket. Testimony indicated that it appeared that defendant could fit into the pants. Additionally, a scale and a glass jar with a powder residue were found in the kitchen, and baggies of cocaine and marijuana were found in the kitchen cabinet above the scale. Personal identifying documentation, including defendant's birth certificate, a copy of his social security card, a paystub, and a dental receipt, were found in a drawer underneath the cabinet or in the cabinet with the drugs.

Contrary to what defendant argues, the evidence established more than his mere presence at a home where drugs were found. The cocaine in the pocket of a pair of men's jeans that were comparable to defendant's size, and the discovery of defendant's identifying documentation at the house, viewed in a light most favorable to the prosecution, showed a sufficient nexus between defendant and the contraband to enable a rational trier of fact to find beyond a reasonable doubt that defendant constructively possessed the cocaine and marijuana found at the house. *Wolfe*, 440 Mich at 521. Although James testified that defendant wore size 36 pants and that defendant was simply an occasional visitor at the North Merrimac residence, it was up to the jury to determine the credibility of James's testimony and to resolve any alleged conflicts in the evidence. *Dunigan*, 299 Mich App at 582; *Bennett*, 290 Mich App at 472.

Defendant further contends that there was insufficient evidence that he possessed the firearm found at the house. In *Johnson*, 293 Mich App at 83, this Court addressed the rules of possession in the context of a firearm, stating:

> One must carry or possess the firearm when committing or attempting to commit a felony. Possession of a firearm can be actual or constructive, joint or exclusive. [A] person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Possession can be proved by circumstantial or direct evidence and is a factual question for the trier of fact. [Quotations and footnotes omitted.]

The evidence was sufficient to enable the jury to rationally conclude that defendant was aware of the rifle and had access to it. Deputy Main testified that when he entered the kitchen, he observed a digital scale in plain view on the counter. The cocaine and marijuana were located in a cabinet in the kitchen. The rifle was found in plain view in the small room or vestibule adjacent to the kitchen, in proximity to the drugs. The evidence connecting defendant to the drugs found at the house, and the location of the rifle in proximity to the drugs, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to rationally find beyond a reasonable doubt that defendant also possessed the rifle found at the house. *Johnson*, 293 Mich App at 83.

II. DEFENDANT'S STANDARD 4 BRIEF

In a pro se Standard 4 brief filed pursuant to Supreme Court Administrative Order No. 2004-06, defendant argues that he was deprived of the effective assistance of counsel. Because defendant did not raise an ineffective assistance of counsel claim in the trial court and this Court denied defendant's motion to remand, our review of this issue is limited to mistakes apparent from the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). "Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). "To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different." *People v Douglas*, 296 Mich App 186, 200; 817 NW2d 640 (2012), aff'd in part and

rev'd in part 496 Mich 557 (2014). "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *Johnson*, 293 Mich App at 90.

"[D]ecisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic decisions with the benefit of hindsight." *Dunigan*, 299 Mich App at 589-590. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). The burden of establishing the factual predicate for a claim of ineffective assistance is on the defendant. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant first argues that the statute of limitations expired on October 20, 2012, six years after the date of the charged offenses on October 20, 2006. Defendant contends that because he was not arraigned on the charges until January 2013, his convictions violate due process of law, and trial counsel was ineffective for failing to object to the delayed arrest and arraignment.

MCL 767.24 addresses the time limitations for indictments, but the six-year period also contains an extension and nonresident tolling provision. MCL 767.24(6)-(8). The record discloses that defendant lived in Texas for an extended period before returning to Michigan to resolve these charges. In his discussion of this issue, defendant merely refers to the six-year limitations period and does not address the tolling provision, his departure from the jurisdiction, and the circumstances surrounding his departure. Because the limitations period is subject to a tolling provision for "[a]ny period during which the party charged did not usually and publicly reside within this state," MCL 767.24(7), the record indicates that defendant lived in Texas for an extended period before returning to Michigan, and defendant has not presented any evidence to factually show that the statutory tolling provision would not apply, defendant has failed to meet his burden of establishing the factual predicate for this claim of ineffective assistance of counsel. *Hoag*, 460 Mich at 8.

Defendant next argues that trial counsel was ineffective for failing to object to the validity of the search warrant on the basis that the supporting affidavit did not contain sufficient information regarding the confidential informant, that the warrant failed to specifically describe the place to be searched, and that the search warrant was stale. We find no merit to these arguments.

In *Malone*, 287 Mich App at 663, this Court stated:

> A search warrant may only be issued upon a showing of probable cause. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651(1). Probable cause for issuance of a search warrant exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the location to be searched. *People v Unger*, 278 Mich App 210, 244; 749 NW2d 272 (2008). When reviewing a magistrate's decision to issue a search warrant, this Court must

> examine the search warrant and underlying affidavit in a common-sense and realistic manner. *People v Darwich*, 226 Mich App 635, 636-637; 575 NW2d 44 (1997). Under the totality of the circumstances, this Court must then determine whether a reasonably cautious person could have concluded that there was a substantial basis for the magistrate's finding of probable cause. *Id*. at 637. When a person of reasonable caution would conclude that contraband or evidence of criminal conduct will be found in the place to be searched, probable cause for a search exists. *Id*.

If a search warrant affidavit is based on information supplied by an unnamed person, it must contain affirmative allegations from which a magistrate may conclude that the unnamed person was credible or the information provided was reliable. MCL 780.653(2); *People v Poole*, 218 Mich App 702, 706; 555 NW2d 485 (1996). Contrary to what defendant argues, the search warrant affidavit contained affirmative allegations to satisfy this requirement. Credibility can be established by allegations disclosing that the informant has provided information in the past that proved to be correct upon investigation. *People v Walker*, 401 Mich 572, 582-583; 259 NW2d 1 (1977). The affidavit alleged that the confidential informant had been assisting law enforcement for 19 months, had engaged in more than 40 narcotics purchases, and that 10 search warrants were issued as a result of the informant's purchases. The affidavit further alleged that "[t]he informant has never furnished any false or misleading information during the time that the affiant has known the informant." These allegations were sufficient to enable the magistrate to find that the informant was credible. In addition, reliability may be established when facts stated in an affidavit are confirmed by independent police investigation and corroboration. *People v Waclawski*, 286 Mich App 634, 699; 780 NW2d 321 (2009). The affidavit alleged that the confidential informant participated in two controlled purchases of cocaine with an individual from the North Merrimac residence, that the informant was searched immediately before making the purchases, that the affiant personally observed the informant participate in the hand-to-hand transactions and then return to a pre-arranged meet location without any intervening stops or having contact with any other persons, and that the substances obtained by the confidential informant field-tested positive for cocaine. These allegations were sufficient to enable the magistrate to find that the information provided by the informant was reliable.

We also reject defendant's argument that the search warrant failed to "specifically" describe the place to be searched. A search warrant must particularly describe the place to be searched or things to be seized. MCL 780.654(1); *People v Keller*, 479 Mich 467, 475; 739 NW2d 505 (2007). The purpose of the particularization requirement is to avoid the risk of the wrong property being searched or seized. *People v McGhee*, 255 Mich App 623, 626; 662 NW2d 777 (2003). Here, the search warrant authorized a search of the premises at 160 North Merrimac, including "[a]ll rooms, compartments, spaces and any attic or basement, attached garages, detached garages, common areas accessed by residents of the apartment complex, and all areas within the curtilage of the home, including shrubs, trees, gardens, greenery, wood piles, and dog pens accessible there from[.]" The warrant was sufficiently specific in describing the place to be search, considering the nature of the evidence sought. See *People v Martin*, 271 Mich App 280, 304; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008) (the degree of specificity required depends on the circumstances and the types of items involved). The affidavit stated that the evidence sought was small enough to be hidden or concealed on occupants of the home and even hidden in exterior home areas such as in flower pots or dog pens. A lawful search of a

premises extends to the entire area in which the object of the search might be found. *People v Jones*, 249 Mich App 131, 138; 640 NW2d 898 (2002).

We also find no merit to defendant's argument that the search warrant was stale. Although the passage of time is a consideration in determining a search warrant's validity, a lapse in time is less critical when a history of criminal activity or pattern of violations occurs. *People v Gillam*, 93 Mich App 548, 552; 286 NW2d 890 (1979). "In the final analysis, the measure of a search warrant's staleness rests not on whether there is recent information to confirm that a crime is being committed, but whether probable cause is sufficiently fresh to presume that the sought items remain on the premises." *Id*. at 553. In the present case, the affiant stated that an investigation into illegal drug trafficking from the North Merrimac home was ongoing, and two controlled purchases were made in the past month, with the most recent occurring in the last 48 hours. The affiant noted his training and experience in drug trafficking, which included knowledge that drug traffickers maintain a drug supply for customers. The allegations regarding two separate controlled purchases in the past month, with the most recent being just 48 hours earlier, were sufficient to enable the magistrate to conclude that drug trafficking at the North Merrimac home was an ongoing activity, and thus there was probable cause to believe that illegal drugs were still on the premises.

In light of the foregoing, defense counsel was not ineffective for failing to challenge the validity of the search warrant. Any challenge would have been futile. *Ericksen*, 288 Mich App at 201.

Lastly, defendant argues that trial counsel was ineffective for not determining the identity of the confidential informant or calling the informant as a witness. A prosecutor is generally not required to disclose the identity of a confidential informant. *People v Henry*, 305 Mich App 127, 156; 854 NW2d 114 (2014). To obtain the disclosure of a confidential informant, a trial court must balance the informant's right to anonymity against the defendant's right to a fair trial, and must consider the circumstances of the case including the crime charged, possible defenses, the significance of the testimony, and other factors. Additionally, the defendant must establish a need for the informant's testimony. *People v Underwood*, 447 Mich 695, 704-706; 526 NW2d 903 (1994); *Henry*, 305 Mich App at 156. The trial court must determine if the informant has information that would be helpful to the defense. *Underwood*, 447 Mich at 706.

Defendant does not analyze the circumstances of the crime and defenses to support the need for disclosure of the confidential informant. Rather, defendant asserts that the confidential informant did not exist because the cocaine and recorded funds from the two controlled buys were not introduced at trial. However, defendant has not identified any evidence to support the contention that the confidential informant simply did not exist. Moreover, defendant was not charged with any crime related to transactions involving the confidential informant. The charges all related to items discovered during the execution of a search warrant, and the informant was not involved in the execution of the warrant. Defendant has failed to demonstrate that the informant had information that would have been helpful to a defense against the charged offenses.

The record reflects that trial counsel was aware of the informant. Rather than seek the informant's production, and risk having the informant bolster the prosecution's theory that

defendant was involved in drug trafficking, counsel challenged the police testimony in light of the failure to produce the informant and correlate any drug sale funds to controlled drug buys with the informant. In fact, the failure to produce the informant and the cocaine purchased by the informant, and the failure to prerecord the informant's funds and correlate those funds to the cash found on defendant's person, was the focus of defense counsel's closing argument. Defendant has failed to overcome the presumption that trial counsel's trial strategy was reasonable.

Affirmed.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Peter D. O'Connell